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No. 94-956

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
Petitioners,

v.

ALABAMA POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF BLACK WARRIOR ELECTRIC MEMBERSHIP CORPORATION IN OPPOSITION

H. A. LLOYD *
LLOYD, DINNING, BOGGS & DINNING
P. O. Drawer Z
Demopolis, Alabama 36732
(205) 289-0556
Counsel for Black Warrior Electric Membership Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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STATEMENT OF THE CASE

There are certain inaccuracies and omissions in the Statement of the Case presented in Brief of Petitioners (also referred to as Cities), as follows:

(a) At Petitioner's Brief, Pages 3 and 4, it is stated that the private agreements were "exceptions to the general provisions of the Territorial Acts". To characterize the agreements as exceptions is inaccurate, since it is obvious that the agreements are a part of the Territorial Act and are adopted and mandated therein as being in accord with the stated policy of the Legislature in adopting these Acts.

(b) Commencing with Page 5 of Petitioners' Brief, the remainder of Petitioners' "factual background" consists primarily of argument rather than facts.

(c) Likewise, in Petitioners' section entitled "Proceedings Below", commencing at Page 11 of Petitioners' Brief, Petitioners concern themselves primarily with their own contentions and arguments rather than the actions of the lower Courts. For example, Cities in this section (Cities Brief, p. 14), in referring to findings of the Court of Appeals relating to provisions of the incorporated agreements, quoted that Court as recognizing "that their provisions would appear to give the parties the right to allocate new customers without the Legislature's approval' ".

Such a statement is misleading and taken out of context. The full sentence of the Court of Appeals addressing this point (Cities Appendix 5a), is as follows:

> "Standing alone, the provisions we have quoted appear to give the parties the right to allocate new customers without the Legislature's approval. These provisions, however, do not stand alone, as the District Court concluded; they must be read in pari materia with the incorporating provision of the 1985 act, section 37-14-36."

A succinct Statement of the Case would reflect that on July 5, 1991, the United States Court of Appeals for the Eleventh Circuit fully affirmed the decision of the District Court as to the general provisions of the Territorial Acts, finding that the same fulfill both prongs of the *Midcal* test, cited below, and are exempt from the Sherman Act (Cities' Appendix, 46a, 47a and 50a), citing *Fisher v. City of Berkeley,* 475 U.S. 260, 268, 106 S.Ct. 1045, 1050, 89 L.Ed.2d 206 (1986), which quoted *Rice v. Norman Williams Company,* 458 U.S. 654, 665, 102 S.Ct. 3294, 3302, 73 1042 L.Ed.2d (1982). The Eleventh Circuit observed (Cities Appendix 46a) that, unlike the Defendants in *Patrick* or *Midcal,* cited below, the defendants in this litigation do not exercise any private regulatory power. The case was reversed and remanded

to the lower court, however, because the Court of Appeals could not make the same determination regarding the private agreements which were incorporated into the Acts because the terms of the agreements were not contained in the Record. On remand to the District Court, that Court further considered the relation of the private agreements to the Acts, and on March 4, 1992, entered its Memorandum Opinion and Order granting Defendant's Motion to Dismiss (Cities Appendix 9a). Therein, the District Court found that the sole issue was one of law, i.e., whether the terms of the agreements referred to are sufficient to comply with the legal standards set out in *Midcal*; and, reading the agreements in pari materia with the Acts themselves, concluded that the Acts required that modifications of the incorporated agreements be treated as new agreements which cannot become effective without Legislative approval (Cities Appendix 18a and 19a).

On May 23, 1994, upon Cities' third appeal to the Eleventh Circuit, the Court of Appeals affirmed the decision of the District Court dismissing the Cities' case (Cities Appendix 7a and 8a).

SUMMARY OF ARGUMENT

Plaintiffs lay down three basic reasons why they contend the Writ should be granted. First, they contend the decisions below "directly conflict with a series of Opinions of this Court, citing *FTC v. Ticor Title Insurance Company*, 112 S.Ct. 2169 (1992). This contention is completely without merit, since *Ticor*, like *Midcal*, cited below, was addressing the action of a representative or agency of the State rather than the State itself. Here, by express interpretation of the Act itself, no discretion is left to private persons, agencies or other representatives, only to the sovereign.

Second, Plaintiffs say the District Court relied upon decisions which have been reversed or displaced. This conclusion has no rational basis. *Ticor* was reversed sim-

ply to allow the Court below to reexamine its determination and address whether it accorded proper deference to the Commission's factual findings in relation to State supervision. Here, again, the reference is to proper oversight by the State as to pricing. In the instant case, all oversight is by the Legislature itself.

Third, Plaintiffs merely repeat their conclusion that the State Legislation "clearly" does not satisfy *Ticor* and *Midcal.* Again, this allegation is patently without merit as the Legislation does clearly satisfy *Parker, Hoover* and *Bates,* cited below; and is in no way in conflict with either *Ticor* or *Midcal.*

The Alabama Legislature has clearly articulated a policy to displace competition in the retail electric market except for large industrial customers. The sections of the acts which incorporate the described private agreements state that the Legislature has determined that these agreements are consistent with the general purpose of the acts. The sole purpose of the second prong of the *Midcal* test is to prevent a lack of regulation over any possible private anti-competitive conduct. In the instant case, however, the acts themselves strictly control the assignment of service areas to electric providers, and leave no room for private discretion in the assignment of service areas; and, thus, the question of active supervision, if not moot, is clearly provided in the Acts themselves.

ARGUMENT

This case presents the question whether the State Action Doctrine of Immunity from actions under the Sherman Act applies to the action of the State Legislature in establishing and implementing procedures for determining which electric supplier shall furnish electric service to customers at retail within various areas of the State, including areas within present and future corporate limits of municipalities in the State; and in reviewing certain private agreements between electric suppliers and finding that such agreements were not inconsistent with the purposes and policies set forth in its mandated procedures, declaring said agreements to be applicable to the overall policy of the State.

The State Legislative Act is applicable equally to the Plaintiffs and the Respondents, providing to each a territorial playing field to implement its stated purpose. (Cities Appendix 73a and 97a). Indeed, many of the agreements which were found to be applicable to the mandate of the Legislature and to meet the objectives outlined in the State procedures, were entered into between various municipalities in the State of Alabama and some of the Respondents named in this action. Further, one of the Plaintiffs, City of Bessemer, Alabama, was also a party to one of the agreements with Respondent Alabama Power Company and the Tennessee Valley Authority.

It is apparent here that the real party in interest is the State Legislature of the State of Alabama, which as sovereign, not only declares the anti-competitive policy but also actively supervises it (Cities' Appendix, at 116a). To permit these Plaintiffs to look behind the actions of the State sovereign and base their claims on perceived illegal conspiracies among members of the State Legislature and the officials of the State of Alabama would simply emasculate the doctrine in *Parker v. Brown*, cited below. Much consideration has been given by both the District Court and the Eleventh Circuit Court of Appeals to the applica-

tion of the standards laid down in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). However, this Respondent suggests that the action of the State Legislature is the sovereign act of the State itself, and such action by the Legislature, ipso facto, is exempt from the operation of the Anti-Trust laws, without reaching the issues laid down in *Midcal.* (*Hoover v. Ronwin,* 104 S.Ct. 1989 (1984).

Obviously *Hoover* was rendered after *Midcal* and, indeed, certiorari was granted in *Hoover* to review the State action doctrine laid down by the 9th Circuit, reversing a decision of the United States District Court for the District of Arizona, which had dismissed the Plaintiff's action on a FRCP 12(b)(6) motion. Clearly, it was not the intent of this Honorable Court to apply the *Midcal* two-prong test in *Hoover,* thus making it very clear that the principles laid down in *Parker* were still clearly the applicable law, and that a State Legislative Act is simply by its nature exempt from Anti-Trust Law. Moreover, the Ninth Circuit was reversed by this Honorable Court after having taken the position that the Petitioner's might be able to invoke the State Action Doctrine, but reasoned they first must show they were acting pursuant to a "clearly articulated and affirmatively expressed state Policy".

Here, we are not dealing with some activity carried out by regulatory bodies under State authorization; rather, we are dealing solely with the sovereign act of the Legislature itself, restricting the duplication of electric service lines and the supplying of electric service in the State. The Sherman Act has never been construed as prohibiting anti-competitive actions of a State itself, acting through its Legislature (*Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

The *Parker* doctrine was applied in *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d

810 (1977), and, in 1984, it was applied in *Hoover, supra.* This Honorable Court has never departed from the basic reasoning in *Parker,* and there is no basic reason for not applying the *Parker* doctrine in the case presently before it. The record is abundantly clear that all of the issues enumerated by the Plaintiffs in their Petition are merely argumentative or have simply been resolved by this Court in *Parker v. Brown, Hoover v. Ronwin,* and *Bates v. State Bar of Arizona.*

The State Action Doctrine, as laid down in *Parker* is grounded in concepts of Federalism and State sovereignty; and this Court reasoned in *Parker* that "there is no suggestion of a purpose to restrain State action in the (Sherman Acts) Legislative history" (*Parker,* 317 U.S. at 351). As stated above, the conduct which the Plaintiffs complain of is clearly the action of the State itself, not action taken through any regulatory agency, municipality, or private party. *Bates* and *Hoover, supra.*[1] The Eleventh Circuit Court of Appeals went further than the basic *Parker* doctrine and found that the Act itself, as properly interpreted by the District Court, met the two-prong test laid down in *Midcal* (Cities' Appendix, Note 4, at 7a, et seq.). It further found (Cities' Appendix, Note 4, at 7a, et seq.) that the City's effort to require the Court to determine whether the Legislature in incorporating the agreements into the Act by reference exercised sufficient independent judgment and control so that the details of these service area assignments were established as a product of deliberate State intervention, was "so patently meritless as to warrant no discussion", citing *Hoover.*

The two-prong test laid down in *Midcal* was not intended to be applied and never has been applied, to a circumstance where the action was by the sovereign itself,

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[1] Also, see *Community Communications Company v. Boulder,* 455 U.S. 40, 102, S.Ct. 835, 70 L.Ed.2d 810 (1982), wherein Justice Brennan was careful to distinguish between action by the sovereign itself and action taken by a subordinate body.

unless the anti-competitive act is left to the unsupervised discretion of private parties, *Patrick v. Burget,* 486 U.S. 94 at 100. This requirement is designed to insure that the State Action Doctrine will shelter only the particular anti-competitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. *Patrick, supra* at 101. Thus, we should not even reach the issue of whether *Midcal* applies to the present case, since the supervision is obviously by act of the State Legislature itself, including those acts of private parties previously taken as reflected in the incorporated agreements, and found to be in accord with state policies.

Hoover clearly points out that in such cases as *Midcal,* it becomes important to insure that the anti-competitive conduct of the State's representative was contemplated by the State. If the replacing of entirely free competition with some form of regulation or restraint was *not authorized or approved by the State,* then the rationale of *Parker* is inapposite. In other words, where the anti-competitive conduct of a non-sovereign State representative was at issue, the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" (*Boulder*); and has also found in such cases that the degree to which the State Legislature or Supreme Court supervises its representative is relevant to this inquiry (*Midcal*). However, when the conduct is that of the sovereign itself, the danger of unauthorized restraint of trade is not present. In the instant case, any continuing or future acts by parties to the agreements are prohibited by the terms of the Act unless first approved by the State Legislature (Cities' Appendix P. 68a).

Plaintiffs repeatedly seek to characterize legislation as simply authorizing private violation of the Sherman Act. A simple reading of the legislation shows such argument to be not worthy of discussion. The State simply found these agreements to be in line with its stated policy. The

Opinion of the Eleventh Circuit Court of Appeals pointed out that only three of the agreements referred to by Petitioners and incorporated in the Acts were involved in the Appeal, and that the District Court concluded that these agreements must be read in pari materia with the incorporation provision of the 1985 Act, Section 37-14-36, and thus would require Legislative approval before the parties to the agreement could allocate customers between themselves (Cities Appendix, 5a).

CONCLUSION

For the reasons set out herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

H. A. LLOYD *
LLOYD, DINNING, BOGGS
& DINNING
P. O. Drawer Z
Demopolis, Alabama 36732
(205) 289-0556
Counsel for Black Warrior Electric Membership Corporation

* Counsel of Record